April 9, 2008

Mr. Richard M. Brennan
Senior Regulatory Officer
Wage and Hour Division
Employment Standards Administration
U.S. Department of Labor
Room S-3502
200 Constitution Avenue, NW
Washington, DC 20210

Re: RIN 1215-AB35: Comments on the Department of Labor's Notice of Proposed Rulemaking

Dear Mr. Brennan:

I am writing to comment on the Department of Labor's Notice of Proposed Rulemaking on the Family and Medical Leave Act (FMLA), published in the *Federal Register* on Feb. 11, 2008.

As a human resource professional and a member of the Society for Human Resource Management, I respectfully submit these comments and I appreciate the opportunity to share my views on how to improve the implementation of this important law.

I strongly support the original intent of the FMLA. However, over the past 15 years that this law has been administered, I have come to believe that the original regulations issued in implementing the FMLA are in need of reform. I believe that the improvements I recommend here will benefit both employees and employers alike.

I have organized my comments to correspond with the topic areas and section numbers as set forth in the Department's proposed rulemaking.

Eligibility (Section 825.110)

While I applaud DOL for its proposed FMLA improvements, I urge that they include revisions regarding eligibility that would make the regulations more reasonable and workable. I urge the DOL to reconsider its proposed section 825.110(d) that was amended so that any period of employment within five years would be considered in determining if an employee had worked for an employer for 12 months, since that 12-month period need not be consecutive. In my experience as an HR professional, a five-year period is unrealistic and will create an undue burden and cause administrative headaches for employers, especially since FMLA and FLSA regulations only require that an employer keep certain employment records for three years. At a maximum, the final rule should call

for a three-year look-back period, since that is equal to the record retention period in current law.

In addition, in proposed section 825.110, the Department should harmonize the point at which an employee's eligibility for FMLA leave is determined—at the point when leave begins, or when an employee informs his or her employer of a need for leave. One current regulation requires that determination of whether an employee meets the 12-month and 1,250-hour requirements be made as of when the leave begins. This language is retained in proposed section 825.110(d). Another regulation says determination of eligibility for an employee who ostensibly meets the 12-month and 1,250-hour requirements, and who works for an employer with at least 50 employees, must be made when the employee gives notice of the need for leave. That language is retained in proposed section 825.110(e).

Serious Health Condition (Section 825.113)

While I was pleased that the Department suggested clarifications for many elements of the FMLA regulations, I was particularly disappointed to see that the definition of serious health condition was not addressed. Unfortunately, the definition retained in the proposed regulation remains vague and difficult for HR professionals to administer. In light of this lack of clarity, I agree with the Department's recommendation to retain the list of what are considered by regulation to not be serious health conditions. For instance, I believe that Wage and Hour Opinion Letter FMLA-57 correctly states the law, and it should be given a very narrow construction. However, I believe that the language regarding mental illness "resulting from stress" should be removed from the last sentence of Section 825.113(d).

Continuing Treatment (Section 825.115)

I strongly disagree with the Department's decision to not require an employee to make more than two visits to a health care provider during the period of incapacity. As an HR professional who struggles with administering leave due to the chronic serious health conditions of employees, I believe an employee should be required to see such a provider at least four times per year.

It would also be helpful for DOL to include a comprehensive (but not necessarily inclusive) list of common chronic conditions and a better explanation (including concrete examples) of what the Department means by a chronic serious health condition that results in an episodic period of incapacity, rather than a continuing period.

If an increase in required health care provider visits is not made, then I suggest that the second visit or treatment must occur within one week of the initial treatment, and regulation should require the provider to provide that follow-up treatment. Accommodations should be made for clearly defined extenuating circumstances, such as instances where an employee, despite good faith efforts, is unable to secure an appointment within the applicable period. Regulation should state that the applicable period begins with the date of the incapacity.

Finally, regarding the period of incapacity, I suggest that the Department reconsider 2007 recommendations that the number of days for incapacity plus treatment be increased from "in excess of three consecutive calendar days" to seven consecutive calendar days (or at least five consecutive scheduled work days). Also, the regulation section regarding treatment on one occasion plus a regimen of continuing treatment should be eliminated.

The Department has also asked for comments on whether a 30-day time frame should be added to Section 825.115(a)(2), which allows for treatment on one occasion followed by a "regimen of continuing treatment." I agree with the Department that this language should *not* be added.

Intermittent Leave (Sections 825.202 – 825.205)

The greatest disappointment I have with proposed improvements to the FMLA is the failure to increase the minimum increment of intermittent leave (section 825.205). As an HR professional, I know that one of the greatest FMLA compliance challenges that employers face is when an employee takes leave on an unscheduled or unforeseeable basis.

Current regulations cause administrative problems for employers, and unfairly penalize other employees who must work overtime or cover for an absent employee. They lead to operational challenges for businesses that get little or no notice of the employee absence, and thus no means to plan accordingly.

I commend the Department for its proposed section 825.203. It accurately implements the language of the FMLA and clarifies that an employee who needs intermittent or reduced schedule leave for planned medical treatment must make a "reasonable effort" to schedule the leave so that the leave does not unduly disrupt the employer's business. The Department's proposed section 825.203 is a vast improvement over the existing regulation.

The Department should change the size of an increment of FMLA leave, increasing it to two or four hours when an employee takes unforeseeable or unscheduled intermittent or reduced schedule leave.

I also suggest that the department extend an employer's authority to transfer an employee (section 825.204) to include an employee who takes intermittent or reduced schedule leave on an unforeseeable or unscheduled basis. Under the department's proposal, an employer may require an employee to transfer to an alternative, equivalent position when an employee needs *foreseeable* intermittent or reduced schedule leave for *planned* medical treatment.

Finally, even though the Department erred by not increasing the size of an increment of intermittent or reduced schedule leave, it has requested comments on whether there should be an exception in proposed section 825.205 for circumstances in which it is physically impossible for an employee to return to work after taking intermittent or reduced schedule leave. I encourage DOL to include such an exception. It could be limited in application to circumstances in which an employee's physical impossibility to return to work is due to

the location of the work, travel associated for such work, or the ongoing nature of a project.

Essential Functions (Section 825.123)

In determining eligibility for FMLA leave, one of the criteria that an employer can currently apply is whether an employee is unable to perform "any **one"** of the essential functions of the employee's position. I recommend that the Department revise that section to read, "unable to perform the essential functions of the employee's position, unless modified by the employer to accommodate a temporary restriction." I have no objection to adding clarifying information on Form WH-380 that includes a section for employers to list an employee's essential job functions, and where a copy of the job description can be attached.

Treatment of a Holiday (Section 825.200) and Incentive Awards (Section 825.215)

I thank the Department for two specific proposed changes regarding the treatment of holidays and incentive awards. First, retention of the current rule in section 825.200(f) that a holiday counts as FMLA leave when it falls within a week of that leave is reasonable and workable, as DOL notes. Also, the Department's additional clarification on a holiday that falls during FMLA leave that is for less than the week is helpful.

Similarly, I appreciate proposed section 825.215(c)(2), regarding incentive awards. Under this proposal, it would no longer be illegal for an employer to disqualify an employee from receiving a perfect attendance award or safety bonus if the employee does not meet the requirements for those incentives due to absences for FMLA leave. Not only is this a better and fairer interpretation of the FMLA, it will help employee morale, since employees on FMLA leave will not be treated more favorably than other employees.

Substitution of Paid Leave (Section 825.207)

Generally, I support DOL's proposed revisions to 29 C.F.R. 825.207 regarding substitution of paid leave. Specifically, I support the proposal that substitution may occur only when the terms and conditions of the paid leave policy are met, unless an employer waives such terms and conditions. I also support the department's proposal that paid leave may be substituted to make an employee "whole" when disability benefits are received. However, I believe the proposal could be improved further by allowing substitution of paid leave to supplement the unpaid portion of leave when disability payments are made, regardless of employer and employee agreement.

Light Duty (Section 825.220(d))

I believe that an employer should be permitted to require light duty that is consistent with an employee's restrictions, but this should not affect an employee's FMLA entitlement. Therefore, I agree with the Department's recommendation that it strike the sentence regarding placement in a light duty position that has been interpreted to "count" against

FMLA leave entitlement. I also do not believe that this revision would negatively affect an employee's ability to return to his or her original position from a voluntary light duty position.

Employer Notice Requirements (Sections 825.300, 825.302, 825.303)

The Department's proposal on employer notice requirements and communications with employees (section 825.300) should help broaden awareness of the FMLA. Specifically, I agree with the proposal to allow electronic postings of FMLA rights and responsibilities; to consolidate all notice obligations into one section; to clarify when relevant notices must be provided; and to extend the time frame to provide such notices from two to five business days. However, I believe that some new notice requirements that the proposal imposes on employers when an employee requests leave are extremely burdensome and not consistent with employers' statutory obligations under the Act. I urge the Department to eliminate the requirement that employees be told why they are not eligible for or otherwise not entitled to FMLA coverage for their leave.

The proposals in sections 825.302 and 825.303 on employee notice obligations make sense. Specifically, I support the proposal to require employees to follow normal call-in procedures when an employee takes FMLA leave, as well as the clarification as to what constitutes sufficient information to trigger an employer's obligations under the FMLA. Again, however, the proposals could be improved even further.

They should make clear that specific timing requirements required by an employer as part of its call-in procedures (e.g., by a certain time each day) also need to be followed when an employee requests FMLA leave, unless extraordinary circumstances exist. I also suggest that if the proposal requires that employees understand and articulate certain information that would be sufficient to trigger the FMLA obligations of the employers (and such obligations will be included in the general notice communicated to employees), it would eliminate confusion over the current requirement, which says that an employee is simply required to specifically request "FMLA" leave in order to trigger the follow-up process.

Designation of FMLA Leave (825.301)

I generally concur with DOL's approach regarding employer designation requirements and the remedy provision for failing to designate FMLA leave in section 825.301. Specifically, I agree that employers should be allowed to retroactively designate FMLA leave, absent a showing of individualized harm; that employers and employees should be able to mutually agree to retroactively designate FMLA leave; and that the penalty for not designating FMLA leave in a timely fashion should be based on an individualized showing of harm, consistent with the general statutory scheme for FMLA violations. I believe that this interpretation is consistent with the statute and the Supreme Court's interpretation of it in *Ragsdale*.

I do believe, however, that this regulatory section could be improved. It could make clear at what point an employer' obligations are triggered to make follow-up inquiries, as well as

what follow-up questions may be asked. Employers are routinely concerned that asking follow-up questions could expose them to liability under the Americans with Disabilities Act's medical inquiry provisions. Thus, having bright-line guidance as to what questions are appropriate will help facilitate the process and improved communications will ensure that those who are entitled to FMLA receive protections. I also believe it is appropriate to cross-reference this section to 825.302 and 825.303 (employee notice obligations for foreseeable and unforeseeable leave) so that employers and employees are assured that these regulatory sections have consistent interpretations.

General Rule on Medical Certification (Section 825.305)

I generally support DOL's proposed changes in section 825.305 that apply to the rules for obtaining a medical certification to substantiate whether leave qualifies under the FMLA. Specifically, I support DOL's proposal to define what constitutes either an incomplete and insufficient certification, and clarifies that once an employer gives an employee seven days to correct the deficient certification (whether incomplete or insufficient), the FMLA protections do not apply. I also support DOL's proposal that a new "initial" certification may be obtained each leave year. I believe, however, that the proposal could be improved. 1.) Establish that if an employee does not return the certification within the initial 15-day period, the employee is not entitled to FMLA leave, limited to extraordinary circumstances. 2.) Define what constitutes extraordinary circumstances, to support the delay in the return of the certification.

Content of Medical Certification (Section 825.306)

As an HR professional, I applaud the Department's proposed changes regarding what kind of information an employer can request on the medical certification form to substantiate the need for FMLA leave.

Specifically, I support the proposal to define what types of medical facts are required to constitute a sufficient medical certification; to clarify that employees must provide certification that leave is medically necessary to substantiate the need for intermittent or reduced scheduled leave; to clarify that employers may require greater medical information under their own paid leave policies; to clarify that employers can still follow the ADA guidelines for requesting medical information if the need for leave also constitutes a reasonable accommodation that must be provided under the ADA; and to clarify that employees who do not sign a HIPAA release to authorize the release of medical information still have an obligation to provide sufficient medical documentation to substantiate the need for FMLA leave. I also support the elimination of a check box to certify a "serious health condition" on the prototype medical certification form.

However, I believe that the proposal could be improved even further by making the following changes: 1) Make clear that medical facts including information on symptoms, diagnosis, hospitalization, doctor visits, prescribed medication, and referrals for evaluation or treatment or other regimen of continuing treatment "must" be provided, as opposed to "may" be provided. 2) Make clear in the instructions to the health care provider that

responses such as "lifetime, unknown or indeterminate" will not be sufficient, as opposed to "may" not be sufficient to establish FMLA coverage.

Authentication, Clarification, and Second Opinions (Section 825.307)

I support DOL's proposed changes in section 825.307 regarding the authentication, clarification, and second- and third-opinion processes. Specifically, I support the proposal to remove the requirement that an employer receive permission from an employee before obtaining authentication of a medical certification. The new provision states that for clarification purposes, an employee risks having leave not approved if he or she does not grant permission for an employer to clarify the medical information provided by the health care provider.

Similarly, I support removal of the requirement that contact with the health care provider only take place through the employer's provider, and the requirement that relevant medical information must be provided to the health care provider performing the second opinion. However, I believe the proposal could be improved further with the following: 1.) Eliminate the requirement that an employer give an employee an opportunity to cure a deficient medical certification before commencing the clarification process. 2.) Define what constitutes "good faith" for second and third opinions. 3.) Specify that when a certification is obtained by a foreign health care provider, an employer has an automatic right to get a second opinion and/or have appropriate information sent to a health care provider in the United States for purposes of review.

Recertification (Section 825.308)

I support DOL's proposed changes with regard to the recertification process in section 825.308. Specifically, I support DOL's clarification as to what constitutes a change in circumstances, and that the recertification obtained can mirror the information required in the initial certification along with a confirmation from the health care provider that the employee's leave pattern is consistent with the employee's need for FMLA leave. I believe that the proposal could be significantly improved, however, if the final regulation includes a provision that an employer can get second and third opinions upon recertification, and that for long-term or permanent conditions (those lasting more than 12 weeks), an employer should be able to obtain recertification every 30 days regardless of whether an absence occurs in the prior 30 day period.

Fitness for Duty (Section 825.310)

The Department's proposed changes regarding the fitness-for-duty process (section 825.310) represent a good first step at addressing this issue. Specifically, I support the proposal to allow fitness-for-duty exams in connection with intermittent leave when safety concerns exist, and that allow an employer to get certification that the employee can perform all the essential functions of his or her job before returning from FMLA leave, as opposed to a simple statement. I believe the proposal could be improved, however, by allowing fitness-for-duty examinations more frequently than every 30 days if safety

concerns exist, and by confirming that if an employer has a reasonable basis to obtain a fitness-for-duty exam before allowing an employee to return to work in accordance with ADA standards, an employer should be allowed to do so.

Military Family Leave Provisions and Regulatory Issues

In most instances, I support the legislative intent of expanding the FMLA to cover these qualifying events. However, I respectfully suggest that DOL make every effort to provide complete, concise and well-defined regulations to implement this expansion of the law. Such regulatory language will go far in affording both employers and employees with a clear understanding of their rights and responsibilities in providing/seeking leave in response to these qualifying events.

In particular, I believe it will be very important to craft an appropriate definition of the term "qualifying exigency." I recommend that exigency leave should be limited to needs *directly caused by* the military service itself and should specifically exclude routine, everyday life occurrences. If we do not require a close causal connection between the need for leave and military service, we run the risk of subjecting employers to internal complaints and claims of discrimination from other employees who believe they should also be allowed to take leave for any occurrences. In fact, a recent SHRM survey concluded that 98 percent of HR professionals agree that there should be a demonstrable connection between the leave and the service-member's active duty status.

I think it is generally agreed that military leave is not intended to give greater rights to employees with family members called to active duty than those employees would otherwise have for the normal and ordinary life challenges faced by *all* employees. For instance, I believe that exigency leave should be limited to non-medical situations. FMLA leave is already available for employees whose family members have serious health conditions, whether those eligible employees are affiliated with the military or not. Also, because the term "exigency" was used, I believe the leave is meant to be limited to situations that are critical, require immediate attention, and can not be addressed without taking time during work hours. This view is supported by 87 percent of HR professionals according to a recent survey conducted by SHRM.

Lastly, DOL should clarify the interaction of military caregiver leave and regular FMLA leave, including how the caregiver leave should be calculated. I believe the final rule should make it clear that an employer is permitted to apply its normal 12-month period in calculating caregiver leave taken during that period, and that the 26-week maximum leave entitlement during a 12-month period is measured by the employer's normal 12-month period.

Thank you for this opportunity to share my views as a HR practitioner on how the implementing regulations of the Family and Medical Leave Act can be improved. I look forward to the issuance of final regulations soon that include suggestions such as those offered here.

Sincerely,

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